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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

THOMAS DEAN VOGT,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

JAMES M. LAROSSA
LAROSSA, MITCHELL & ROSS
Attorneys for Petitioner
41 Madison Avenue
New York, New York 10010
(212) 696-9700

Questions Presented

1. Whether the law on conspiracy to distribute narcotics may be extended to the mere association of social drug users and suppliers who share cocaine in party settings on a not-for-profit basis.

2. Whether sentencing courts have the authority to grant a downward departure from the Sentencing Guidelines in an atypical conspiracy to distribute case involving not-for-profit sharing of cocaine among social drug users.

3. Whether sentencing courts can assess a defendant purchaser with drugs possessed by his supplier absent a finding that the quantity held by the supplier was in furtherance of their alleged conspiracy.

4. Whether sentencing courts may resolve a dispute as to the quantity of drugs to be assessed to a defendant at

sentencing by arbitrarily picking a number halfway between the government's and defendant's position.

List of Parties

Apart from the petitioner, the other parties to the appeal before the United States Court of Appeals for the Eighth Circuit, whose judgment is sought to be reviewed, were Larry Gene Regennitter and Harry Wayne Ambrose.

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IN THE

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OCTOBER TERM, 1991

THOMAS DEAN VOGT,

Petitioner,

- against -

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Thomas Dean Vogt respectfully requests that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Eighth Circuit entered on May 15, 1991.

Opinions Below

The opinion of the United States Court of Appeals for the Eighth Circuit, United States v. Thomas Dean Vogt, No. 90-1610NI (May 15, 1991), is annexed in the Appendix hereto at 1a-6a. The order of the Eighth Circuit Court of Appeals denying a petition for a rehearing containing a suggestion for rehearing en banc appears in the Appendix at 7a.

Statement of Jurisdiction

The judgment of the United States Court of Appeals for the Eighth Circuit affirming petitioner's conviction was entered on May 15, 1991. On June 25, 1991, the Court of Appeals denied a petition for rehearing containing a suggestion for rehearing en banc. The jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1254(1).

Constitutional Provisions

The Fifth Amendment to the United States Constitution provides:

> "No person shall be . . . deprived of life, liberty, or property, without due process of law . . ."

Statement of the Case

Following a one-month jury trial in the United States District Court for the Northern District of Iowa, petitioner Thomas Dean Vogt was convicted of various offenses arising out of his recreational use of cocaine with other social cocaine users and suppliers, generally in party settings.

Petitioner was convicted of distributing cocaine to a minor,[1] in violation of 21 U.S.C. §§ 841(a)(1) and 845(a) (Count

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[1]This charge related to petitioner's sharing of cocaine with a 20-year-old prostitute who admitted that she had used cocaine and heroin before she ever even met petitioner.

15); possession with the intent to distribute cocaine, in violation of 21 U.S.C.§ 841(a)(1) (Count 18); making his house available for distributing and using cocaine, in violation of 21 U.S.C. § 856 (Count 19); conspiracy to violate the narcotics laws, in violation of 21 U.S.C. § 846 (Count 20) and engaging in conduct which subjected his assets to forfeiture (Count 25). He was acquitted on one count of distributing cocaine to a minor (Count 16) and one count of distributing cocaine (Count 17).

On March 1, 1990, petitioner was sentenced under the Sentencing Guidelines to 110 months imprisonment, to be followed by five years of supervised release.

On April 13, 1990, petitioner filed a notice of appeal to the United States Court of Appeals for the Eighth Circuit. On May 15, 1991, the Court of Appeals

affirmed his conviction. On June 25, 1991, the Court of Appeals denied his petition for rehearing with a suggestion for rehearing en banc.

On September 18, 1991, Associate Justice Harry A. Blackmun granted petitioner's application for an extension of time within which to file the instant petition for a writ of certiorari, and ordered that the petition by filed by November 22, 1991. (8a).

Statement of Facts

A. Introduction

Petitioner, a 33-year-old Iowa businessman at the time of trial, regularly used cocaine at parties and other social gatherings. It was undisputed that he never sold cocaine or any other controlled substance. Nevertheless, and notwithstanding that the government conceded that petitioner's involvement with cocaine was on a purely social and not-for-profit basis, petitioner was charged with conspiring to distribute cocaine, making his house available for cocaine use, and possession with intent to distribute.

The conspiracy charge was based on the government's theory that petitioner and his co-defendants had a tacit agreement to acquire cocaine from a group of drug suppliers for their own use and

for sharing with their friends at social gatherings. Similarly, the charges of possession with intent to distribute and making his home available for the use of cocaine were predicated upon petitioner's sharing of cocaine with friends in social settings. There was no allegation -- and not a scintilla of proof adduced at trial -- that petitioner's involvement with cocaine was on anything other than a social, not-for-profit basis. Indeed, nearly all of the government's witnesses were friends of petitioner who testified that they had used cocaine socially with him and that he shared his cocaine with others.

B. The "Conspiracy"

According to the government, petitioner was part of a conspiracy which had three "distinct but related" groups of participants. The first group consisted

of three individuals, Keith McVay, Tim Johnson and Lon Vogt (petitioner's brother), each of whom supplied cocaine to the second group, composed of petitioner and his co-defendants. The third group consisted of individuals with whom petitioner and his co-defendants shared their cocaine, free of charge, at parties or get-togethers.

To prove that petitioner was a party to an illegal agreement to acquire cocaine for distribution to others, the government relied essentially on five witnesses. The following summarizes the testimony of each of these witnesses in the light most favorable to the government:

1. Rod Jiruska -- Jiruska, originally one of petitioner's co-defendants, pleaded guilty prior to trial and testified against petitioner. Jiruska was a personal friend of petitioner who

bought cocaine with petitioner and used it with him and others at social gatherings. The government, therefore, categorized him as a "second group" conspirator -- one who bought cocaine and then subsequently shared it with others at parties.

Importantly, however, though Jiruska was permitted to plead guilty to conspiracy as part of his plea bargain, his testimony did not even come close to establishing the traditional elements of conspiracy. He conceded that:

> There was no formal understanding or worded understanding. It was just a matter of social presence, I guess. If one of us had it, you would share it with the other just like you would with drinks.

(R. 1534).[2]

Jiruska further admitted that he had no understanding (either explicit or

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[2]Citations preceded by the letter "R." refer to pages from the trial record.

implicit) with petitioner about sharing cocaine; nor was there any agreement that if he shared his cocaine with petitioner on a particular day, petitioner would provide him with some later. While Jiruska occasionally shared his cocaine with others, he did so because he wanted to and not pursuant to any agreement. (R. 1604-1605).

2. Ron Kelley -- Kelley was another friend of petitioner's in the so-called "second group" who was originally named as a co-defendant, but then pleaded guilty and testified against petitioner at trial. Like Jiruska, however, Kelley was unable to substantiate that a conspiracy to distribute existed. He denied having any agreement with petitioner or anyone else to share cocaine. (R. 1664, 1702-03). Although he shared his cocaine at parties and other social gatherings (R. 1704), he

never had a single conversation with anyone about when or where cocaine would be shared, or even whether it would be available. (R. 1697).

3. Tim Johnson -- Johnson was a supplier who testified that petitioner occasionally purchased cocaine from him and then shared it with him. Johnson attended parties at petitioner's residence at which cocaine was used, (R. 1273, 1276, 1284), and explained that if he wanted to use cocaine but didn't have any, it was "just courtesy [for others] to share." (R. 1287).

4. Keith McVay -- McVay also supplied cocaine to petitioner and attended social gatherings at petitioner's home. At parties, McVay shared his cocaine with others and assumed that others would share theirs with him. (R. 302). Significantly, McVay pointed out

that the cocaine was used recreationally and was incidental to the purpose for which the parties were held:

> [J]ust because there was parties does not necessarily mean they were intended to be coke parties, just people that had coke that went there. They were like for birthday parties, various parties[.]

(R. 318).

5. Lon Vogt -- On occasion, Vogt, petitioner's brother, sold cocaine to petitioner. However, he had no agreement with petitioner that the cocaine which petitioner acquired from him was to be shared or distributed to others. As with McVay, Vogt shared his cocaine with others at social gatherings simply because he wanted to:

> Yeah, if I was at a party and I put out however many lines, or whatever I wanted to put out, I did it because I wanted to.

(R. 2055). In Vogt's view, if someone at a party shared their cocaine with him,

"that was their business." (R. 2063). However, there was no agreement to do so.

* * *

Based on the testimony of these witnesses, petitioner was convicted of conspiring to acquire cocaine and distribute it to others.

C. Request for Downward Departure

Petitioner requested that the district court depart downward from the Sentencing Guidelines on the ground that the charges against him did not involve the distribution of narcotics for profit. Although the government conceded that the case did not involve the sale or distribution of drugs for commercial gain, the court denied petitioner's request because it did not think it had the power to grant a departure on that basis. The court explained that:

> The Sentencing Commission is charged with the responsibility of implementing the statute, it cannot create law where the law doesn't exist, and so this Court does not believe it can create law where law doesn't exist, and to depart from the established guidelines on the basis that there is no profit made would be to carve out in effect an exception to the statute, which the Court is not privileged to do.

(S.R. 189) (emphasis added).[3]

D. The Quantity Assessment

At the time of sentencing, the district court attributed a total quantity of 841.45 grams of cocaine to petitioner, thus giving him a base offense level of 28. The total quantity included (i) 283.5 grams relating to two purchases petitioner made from Keith McVay, and (ii) 250 grams relating to purchases he made from Tim Johnson.

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[3]Citations preceded by the letters "S.R." refer to pages from the record of petitioner's sentencing.

1. The Purchases from McVay

The court assessed petitioner with 283.5 grams that McVay had, or said he had, when he sold smaller amounts of cocaine to petitioner on two occasions. On the first occasion, petitioner told McVay that he wanted to purchase a half ounce of cocaine. McVay went to petitioner's house with a bag containing over two ounces of cocaine, removed the half ounce and gave it to petitioner. Nevertheless, at sentencing, petitioner was assessed with the full two ounces -- four times the amount he bought from McVay.

On the second occasion, McVay sold petitioner one ounce of cocaine and mentioned to him that the ounce had come from a half-pound quantity that he, McVay, had recently purchased. Again, at sentencing, the full half pound -- eight

times what he had purchased -- was attributed to petitioner.

There was no finding at sentencing that McVay held these large quantities "in furtherance of the conspiracy" in which petitioner was an alleged member. Rather, the court simply found that it was "not unreasonable" for petitioner to foresee that McVay -- as a cocaine supplier -- would possess these large quantities.

2. The Purchases From Johnson

The court's assessment of the total quantity of drugs involved also included 250 grams of cocaine relating to petitioner's purchases from Tim Johnson. The amount that was properly attributable to petitioner as a result of these purchases was hotly disputed at sentencing. The government relied on the pre-sentence report ("PSI") and took the position that the court should attribute

425.25 grams to petitioner. On the other hand, petitioner argued that no more than 99 grams should be attributed to him. The court, without any explanation whatsoever, split the difference and arbitrarily assessed petitioner with 250 grams.

REASONS FOR GRANTING THE WRIT

I.

THERE IS A CONFLICT BETWEEN THE EIGHTH AND ELEVENTH CIRCUITS AS TO WHETHER THE LAW ON CONSPIRACY TO DISTRIBUTE NARCOTICS MAY BE EXTENDED TO THE MERE ASSOCIATION OF DRUG USERS AND SUPPLIERS WHO SHARE COCAINE IN PARTY SETTINGS ON A NOT-FOR-PROFIT BASIS.

The government's attempt to expand conspiracy law in drug distribution cases to cover not-for-profit, social associations among casual drug users and their suppliers has recently been rejected on strikingly similar facts as are present at bar. In United States v. Hardy, 895 F.2d 1331 (11th Cir. 1990), the Eleventh Circuit Court of Appeals reversed the defendant's conviction for participating in a conspiracy to distribute cocaine which was predicated on nothing more than the defendant's social cocaine use and his association with other drug users and suppliers in party settings.

The critical facts of Hardy are almost on all fours with the facts here. The defendant Hardy was a frequent user of cocaine, and regularly hosted parties at his residence which were attended by drug users and suppliers. Hardy had jointly obtained and used cocaine with friends and had shared cocaine with others in his home. At trial, the government offered the testimony of fifteen of Hardy's friends, all of whom had pleaded guilty and testified in return for favorable treatment by the government. All of these witnesses testified that they had used cocaine in Hardy's home on a purely social basis and that Hardy had possessed and used drugs with them. There was no evidence, however, that Hardy possessed large quantities of cocaine or that he had ever engaged in the sale or distribution of narcotics for commercial gain.

In the government's view, these facts were legally sufficient to establish a conspiracy to distribute cocaine. In arguing for the affirmance of Hardy's conviction on appeal, the government urged that the cocaine parties hosted by Hardy and his friends "reflected a joint effort to obtain cocaine, distribute the drug among select invitees, and then consume it." (Govt. Brief on Appeal in United States v. Hardy, excerpted herein in the Appendix at 9a-15a, at p. 11a.) The government also argued that a conspiracy had been established because:

> The evidence showed that [Hardy] provided a secure place where cocaine could be delivered, that oftentimes the suppliers were also guests of [Hardy], that cocaine was knowingly distributed and shared on the premises by [Hardy] and his invitees, and that the incidents constituted "regularized activity" recurring over a substantial period of time.

Id.

Thus, the government in Hardy put forth precisely the same novel theory of a conspiracy to distribute cocaine as was relied upon here.[4]

In Hardy, however, the Eleventh Circuit reversed, finding that the evidence was insufficient to sustain the defendant's conviction for conspiracy to distribute cocaine. The court ruled that although Hardy was a drug user and had hosted parties where cocaine was bought, sold and consumed, there was no basis to conclude that he was a party to an agreement to distribute.

In rejecting the government's overzealous attempt to extend the law to cover Hardy's conduct, the court cautioned that "conspiracy law is not a dragnet for

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[4]Under the government's extreme theory, every drug user who does not use his or her drugs alone would be guilty of a conspiracy to distribute.

apprehending those with criminal dispositions." 895 F.2d at 1335 (citation omitted). It further noted that while a vigorous effort on the part of the government to prosecute drug offenders is laudable, the salutary goal of winning the "war on drugs" must not eclipse our society's fundamental protection that no defendant may be convicted except upon evidence which is legally sufficient to establish that he committed the crime charged. Id. at 1333.

Thus, in reversing Hardy's conviction for conspiracy to distribute cocaine, the Eleventh Circuit refused to extend the law on conspiracy to distribute narcotics to the mere association of social drug users and suppliers. The Eighth Circuit's affirmance of petitioner's conviction for conspiracy to distribute cocaine is completely at odds with Hardy. Given the

striking similarity of the facts in these cases, the two decisions are hopelessly irreconcilable.

Here, as in Hardy there was not a scintilla of proof, even viewing the evidence in the light most favorable to the government, that petitioner was a party to an agreement -- explicit or tacit -- to distribute cocaine. Rather, as in Hardy, the evidence merely established petitioner's possession of cocaine, his purchase of it from suppliers, his use of it at social gatherings in his home and his occasional sharing of it with others. As in Hardy, there was absolutely no evidence adduced at trial that petitioner ever profited from his involvement in cocaine; similarly, the amount of cocaine which petitioner possessed at any one time was relatively small.

In affirming petitioner's conviction for conspiracy to distribute cocaine, the Eighth Circuit essentially endorsed the view that the mere association among drug users and suppliers, coupled with the frequent use of drugs -- even on a purely recreational, not-for-profit basis -- can form the basis for a conspiracy to distribute cocaine. Insofar as the Eleventh Circuit in Hardy refused to conclude that under such circumstances a tacit agreement to distribute cocaine existed, its decision is in direct conflict with the law of the Eighth Circuit and certiorari should be granted to resolve this split in the Circuits.

II

THIS COURT SHOULD CONFIRM THAT SENTENCING COURTS HAVE THE AUTHORITY TO GRANT A DOWNWARD DEPARTURE FROM THE SENTENCING GUIDELINES IN AN ATYPICAL CONSPIRACY TO DISTRIBUTE CASE INVOLVING NOT-FOR-PROFIT SHARING OF COCAINE AMONG SOCIAL DRUG USERS.

A. Introduction

Prior to sentencing, petitioner moved before the district court for a downward departure from the Sentencing Guidelines on the ground that he did not engage in the distribution of narcotics for profit. Believing that it lacked the authority to grant a departure on this ground, the court denied petitioner's application. S.R. 89.

On appeal, the Eighth Circuit compounded the district court's error by holding that the district court did not abuse its discretion in denying a downward departure. (5a). It further held that

the district court's refusal to depart was not reviewable. Id.

The Court of Appeals was wrong on both scores. Petitioner did not even argue that the district court abused its discretion in denying departure, but rather that the court erroneously thought it did not have the statutory authority to depart. As such, the court's refusal to depart because it believed it lacked the power to do so was fully reviewable by the Court of Appeals.

B. Authority to Depart Downward in an Atypical Case

On the facts of this case, the district court clearly had the authority to sentence petitioner below the applicable guideline range. A sentencing court may depart from the guidelines if it finds that there is "an aggravating or mitigating circumstance of the kind, or to

a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described." 18 U.S.C. § 3553(b); U.S.S.G. § 5K2.0, p.s. In determining whether the Sentencing Commission adequately took a particular factor into account, a court can consider only the guidelines, policy statements, and official commentary of the Sentencing Commission. Id.; United States v. Feinman, 930 F.2d 495, 501 (6th Cir. 1991).

As a general proposition, it seems plain that the relatively harsh penalties for drug offenders which are mandated by the guidelines reflect the Commission's view that drugs are the scourge of our society and that individuals who engage in narcotics trafficking for profit should be

punished severely.[5] It is far from clear, however, that the Commission ever contemplated that these severe penalties would be imposed where the activity did not involve any potential economic gain to the participants.

A thorough review of the guidelines, policy statements, and official commentary fails to reveal any indication whatsoever that in promulgating the guidelines relating to drug offenders, the Commission considered the possibility of a conspiracy to distribute narcotics entailing a not-

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[5]This is confirmed by comparing the guideline ranges for trafficking (§ 2D1.1) with those for mere possession (§ 2D2.1). See also United States v. Swiderski, 548 F.2d 445 (2d Cir. 1977) ("statutory drug enforcement scheme . . . draws a sharp distinction between drug offenses of a commercial nature and illicit personal use of controlled substances"). In addition, since 21 U.S.C. § 841(b)(1) provides the "primary basis" for the guidelines on drug trafficking, U.S.S.G. § 2D1.1 comment. (n.10), these harsh penalties reflect Congress' view as well.

for-profit, recreational "sharing" of drugs, as opposed to a scheme designed to achieve some commercial gain. This is hardly surprising given that there does not appear to be a single reported case in which the government has ever successfully prosecuted a not-for-profit conspiracy to distribute drugs.

The guidelines were designed to incorporate only those factors which made a "significant difference in pre-guidelines sentencing practice." U.S.S.G. Ch. 1, Pt. A, intro. comment. 4(b). Where the guidelines do not take a factor into account, it is often because the factor did not occur with any frequency in pre-guidelines practice and was therefore "not empirically important in relation to the particular offense." Id. As the Sentencing Commission specifically pointed out: "[R]are occurrences are precisely the

type of events that the courts' departure powers were designed to cover -- unusual cases outside the range of the more typical offenses for which the guidelines were designed." Id.

The rare case of a not-for-profit conspiracy to distribute cocaine -- if such a legal creature can exist -- presents precisely the type of unusual case in which the court is entitled to depart from the guidelines. As the Sentencing Commission indicated:

> The Commission intends the sentencing courts to treat each guideline as carving out a "heartland," a set of typical cases embodying the conduct that each guideline describes. When a court finds an atypical case, one to which a particular guidelines linguistically applies but where conduct significantly differs from the norm, the court may consider whether a departure is warranted. Section 5H1.10 (Race, Sex, National Origin, Creed, Religion and Socio-Economic Status), the third sentence of § 5H1.4 (Physical Condition,

> Including Drug Dependence and Alcohol Abuse), and the last sentence of § 5K2.12 (Coercion and Duress) list several factors that the court cannot take into account as grounds for departure. With those specific exceptions, however, the Commission does not intend to limit the kinds of factors, whether or not mentioned anywhere else in the guidelines, that could constitute grounds for departure in an unusual case.

Id. (emphasis added).

In instances where the Commission, in formulating the guidelines, did consider the lack of a profit motive in the commission of an offense, it directed that the applicable offense level be decreased by up to eight levels. See U.S.S.G. § 2G1.1, comment. (n.1) (Transportation for the Purpose of Prostitution or Prohibited Sexual Conduct) ("In the infrequent case where the defendant did not commit the offense for profit . . . the Commission recommends a downward

departure of 8 levels"); U.S.S.G. § 2L1.1 (Smuggling, Transporting, or Harboring an Unlawful Alien) ("If the defendant committed the offense other than for profit, decrease by 3 levels"); U.S.S.G. § 2L2.1 (Trafficking in Evidence of Citizenship or Documents Authorizing Entry) (same); U.S.S.G. § 2L2.3 (Trafficking in a United States Passport) (same). Thus, when the lack of a profit motive in the commission of certain offenses was brought to the Commission's attention, the Commission acted in an affirmative way to ensure that the defendants in such cases would benefit from a reduced offense level.

Here, the district court concluded that since the Commission considered profit motive with respect to certain offenses, it must have also considered it -- and found it irrelevant -- with regard

to the distribution of narcotics. S.R. 89. Such reasoning, however, flies in the face of the Commission's explicit proviso that "the Commission does not intend to limit the kinds of factors, whether or not mentioned anywhere else in the guidelines, that could constitute grounds for departure in an unusual case." U.S.S.G. Ch. 1, Pt. A, intro. comment 4(b) (emphasis added). Thus, simply because the guidelines do not list profit motive as a specific offense characteristic for narcotics offenses does not mean that such a factor should not be considered relevant to sentencing. See U.S.S.G. § 5K2.0, p.s. ("[A] factor may be listed as a specific offense characteristic under one guideline but not under all guidelines. Simply because it was not listed does not mean there may not be circumstances when that factor would be relevant to sentencing.")

Under the guidelines themselves, the court had the authority to grant petitioner a downward departure on the ground that his conduct was not in furtherance of commercial gain. Id. The district court erroneously ruled that it was powerless to grant a downward departure. Accordingly, certiorari should be granted to resolve the important question of whether downward departure is authorized in an atypical conspiracy to distribute case involving the not-for-profit sharing of cocaine among social drug users.

C. Reviewability of Refusal to Depart Downward

In general, a sentencing court's failure to depart downward from the guidelines is not reviewable. See United States v. Richardson, 901 F.2d 867 (10th Cir. 1990) and cases cited therein at 870;

18 U.S.C. § 3742. However, where, as here, the court imposes a sentence within the guideline range, but under the erroneous belief that it had no authority to grant a downward departure, the sentence is "imposed as a result of an incorrect application of the sentencing guidelines," and is reviewable. 18 U.S.C. § 3742(a)(2).

Accordingly, whether the court had the authority to depart downward in this case -- as opposed to whether it should have done so, in the exercise of its discretion -- is a question of law that was subject to plenary review. United States v. Lowden, 905 F.2d 1448, 1449 (10th Cir.), cert. denied, __ U.S. __, 111 S.Ct. 206 (1990); United States v. Ortiz, 902 F.2d 61, 63-64 (D.C. Cir. 1990); United States v. Rosen, 896 F.2d 789, 792 (3d Cir. 1990); United States v. Fossett,

881 F.2d 976, 979 (11th Cir. 1989); United States v. Russell, 870 F.2d 18 (1st Cir. 1989). For this reason, the Eighth Circuit erred in ruling that petitioner's claim was not cognizable on appeal.

The Eighth Circuit's own prior cases establish that the refusal to depart downward because of an erroneous belief regarding the court's authority is reviewable. See, e.g., United States v. Evidente, 894 F.2d 1000, 1005 (8th Cir.) cert. denied, __ U.S. __, 110 S.Ct. 1956 (1990). The Court of Appeals' decision in this case to the contrary thus represents an unwarranted refusal by the Eighth Circuit to follow its own precedent, and therefore certiorari should be granted.

III

BY UPHOLDING THE DISTRICT COURT'S DETERMINATION AS TO THE QUANTITY OF COCAINE INVOLVED, THE COURT OF APPEALS SANCTIONED A DEPARTURE FROM ACCEPTED CRIMINAL PROCEDURE.

A. Quantities Possessed By Co-Conspirators

As indicated in the Statement of Facts supra, petitioner was assessed at sentencing with 283.5 grams of cocaine that Keith McVay -- a supplier and alleged unindicted co-conspirator -- had, or said he had, when he sold small amounts of cocaine to petitioner on two occasions. Petitioner objected to being assessed with any more than the 42 grams of cocaine that he purchased from McVay.

Under the Sentencing Guidelines, petitioner could be assessed with the cocaine possessed by McVay only if the sentencing court found that McVay's possession of these large quantities was

both 1) in furtherance of the conspiracy, and 2) reasonably foreseeable to petitioner. U.S.S.G. § 1B1.3, comment. (n.1); United States v. North, 900 F.2d 131 (8th Cir. 1990); United States v. Joyner, 924 F.2d 454 (2d Cir. 1991); United States v. Carmody, 753 F. Supp. 917 (M.D. Ala. 1990), aff'd, 940 F.2d 673 (11th Cir. 1991).

The district court made no finding whatsoever that McVay possessed the 283.5 grams in furtherance of the alleged conspiracy. Rather, the court attributed all of McVay's cocaine to petitioner on the sole ground that it was not unreasonable for petitioner to foresee that McVay -- a drug dealer -- would have such a large quantity of drugs on hand. S.R. 395. Thus, the court totally disregarded the first prong of the two-prong test set forth in the guidelines for

determining whether petitioner could be held accountable for the drugs possessed by McVay.

The district court's failure to make an explicit factual finding that the cocaine attributed to petitioner was "in furtherance of the conspiracy" was in clear derogation of the Sentencing Guidelines, which sets forth the circumstances in which the sentencing court may attribute an alleged co-conspirator's drugs to a defendant at sentencing.[6] Cf. United States v. Rivera, 898 F.2d 442 (5th Cir. 1990) (narcotics distribution case remanded because district court did not make any findings in assessing defendant with quantities of hereon attributable to his co-defendants).

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[6]The point is not simply an academic one. Sentences under the Guidelines for drug offenses are, for the most part, determined by the quantity of drugs involved. See U.S.S.G. § 2D1.1(a)(3).

As the Eighth Circuit itself has held in a case involving quantity determinations under the guidelines, "[s]imple knowledge that a supplier supplies other persons is not enough . . . to assess all quantities attributed by the supplier to each person who purchased drugs from that supplier." North, 900 F.2d at 134; see Carmody, supra. Rather, before a supplier's drugs can be attributed to a purchaser, there must be an agreement between the purchaser and the supplier which includes as part of its purpose the sale of drugs by the supplier to other individuals. North, 900 F.2d at 133.

Where, as here, there was no evidence that petitioner had any agreement with McVay concerning McVay's sale of drugs to other individuals, there is no basis for

attributing all of McVay's cocaine to petitioner.[7] See North, supra.

In affirming the district court's attribution of McVay's cocaine to petitioner without first having made a finding that McVay possessed the total amount -- 283.5 grams -- in furtherance of the alleged conspiracy, the Court of Appeals departed from the established procedure mandated by the guidelines and its own decision in North, supra. For this reason, certiorari should be granted.

B. There Must Be Proof in the Record for the Quantity Assessed.

The court assessed petitioner with 250 grams of cocaine as a result of his purchases of cocaine from another

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[7]There was no evidence that petitioner or any of his alleged co-conspirators ever bought, sold, used, or otherwise had any connection whatsoever with the large quantities of cocaine belonging to McVay.

supplier, Tim Johnson. However, the court failed to provide any explanation whatsoever for its determination. Furthermore, there was no proof in the record for the quantity that the district court assessed. Rather, the court simply picked a number, arbitrarily, which was approximately halfway between the government's and petitioner's position.

Rule 32(c)(3)(D) of the Federal Rules of Criminal Procedure requires that the court make a specific finding as to each matter in the PSI that is disputed by a defendant, or state that no finding is necessary because the disputed matter will not be taken into account at sentencing. The rule serves two purposes: 1)- it safeguards a defendant's due process right to fair sentencing procedures -- in particular, the right to be sentenced only on the basis of accurate information, and

2) it ensures that there will be a complete record regarding the district court's resolution of disputed facts to facilitate judicial review. United States v. Mischler, 787 F.2d 240, 246 (7th Cir. 1986) (citation omitted). Strict compliance with the Rule is required, and if the district court fails to make the required findings or determinations prior to sentencing, the sentence must be vacated and the defendant resentenced. See, e.g., United States v. Fernandez-Angulo, 897 F.2d 1514, 1516 (9th Cir. 1990) (en banc).

Here, the district court merely prepared a chart entitled "Final Quantity Determinations" which indicated the number of grams that the court decided should be attributed to each of the defendants. There was no record made, nor any explanation given, as to the basis for any of the numbers on the court's chart.

Furthermore, the government's position at sentencing was that petitioner should be assessed with 425.25 grams of cocaine, representing thirty one-half ounce purchases from Johnson. Petitioner testified that his purchases from Johnson amounted to no more than 99 grams. In attributing petitioner with 250 grams, the court assessed an amount that was not even suggested by any of the evidence before it. Under these circumstances, it was clearly obligated to state on the record how it arrived at the figure it did. Cf. United States v. Weichert, 836 F.2d 769, 772 (2d Cir. 1988) (sentencing court should indicate the basis for the precise amount it chose to order as restitution).

Although the guidelines permit the sentencing court to approximate the amount of unseized drugs attributable to a defendant, U.S.S.G. § 2D1.4, comment.

(n.2), the Eighth Circuit itself has acknowledged that there must be some evidence in the record to support the court's approximation. United States v. Lawrence, 915 F.2d 402, 408 (8th Cir. 1990). Thus, while any reliable information may be considered in making the approximation, see U.S.S.G. § 6A1.3(a), there must be an acceptable evidentiary basis for the court's finding. United States v. Rodriguez, 897 F.2d 1324 (5th Cir.), cert. denied, __ U.S. __, 111 S.Ct. 158 (1990).

Here, there was no rational or factual basis in the record to support the court's determination that the quantity to be assessed as a result of the Johnson sales was 250 grams. Arbitrarily picking a number which is halfway between the government's and petitioner's position is hardly an "acceptable evidentiary basis"

upon which a finding can be made. Rodriguez, 897 F.2d at 1326. See Lawrence, supra (district court reversed for arbitrarily approximating the quantity of cocaine attributed to defendant who was involved in a four-year drug conspiracy by simply dividing in half the amount of cocaine the defendant admitted purchasing over an eight-year period).[8]

In affirming the district court in this case, the Eighth Circuit departed from accepted criminal procedure as well as its own precedent requiring that drug quantities, even if approximated, be based on the evidence adduced, rather than being arrived at arbitrarily. For this reason, certiorari should be granted.

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[8]It is interesting to note that the district judge who was reversed in Lawrence for arbitrarily approximating the amount attributed to the defendant is the very same district judge who arbitrarily approximated the amount of cocaine relating to the Johnson sales here.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be granted.

Dated: New York, New York
November 22, 1991

Respectfully submitted,

JAMES M. LaROSSA
LaROSSA, MITCHELL & ROSS
Attorneys for Petitioner
Thomas Dean Vogt
41 Madison Avenue
New York, New York 10010
(212) 696-9700

Of Counsel

Karen F. Silverman
Andrew J. Weinstein

APPENDIX

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 90-1460NI

United States of America, *
*
Appellee, *
v. *
*
Larry Gene Regennitter, *
*
Appellant. *

No. 90-1610NI

United States of America, * Appeals
* from the
Appellee, * United
* States
v. * District
* Court
Thomas Dean Vogt, * for the
* Northern
Appellant. * District
of Iowa.

[UNPUBLISHED]

No. 90-1611NI

United States of America, *
*
Appellee, *
v. *
*
Harold Wayne Ambrose, *
*
Appellant. *

Submitted: November 12, 1990
Filed: MAY 15, 1991

Before LAY, Chief Judge, FAGG, Circuit Judge, and LARSON,* District Judge.

PER CURIAM.

Larry Regennitter, Thomas Vogt, and Harold Ambrose (collectively the appellants) appeal their convictions and sentences for conspiracy to distribute cocaine and related crimes. We affirm.

The appellants raise several contentions related to the sufficiency of the evidence supporting their convictions. We reject all of these contentions. First, the record contains substantial evidence on which the jury reasonably could have found appellants guilty of all charges. Second, the district court did not abuse its discretion in denying the motions for severance and for judgment of acquittal, or in instructing the jury on

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*The HONORABLE EARL R. LARSON, United States District Judge for the District of Minnesota, sitting by designation.

permissible inferences, essential elements of the crimes, or definitions of the elements. Third, the appellants' assertions of prosecutorial misconduct, insufficiency of the indictments, juror misconduct, and inability to cross-examine a witness either are unsupported by the record, otherwise without legal merit, or both.

The appellants also raise many arguments about their sentences. We reject these arguments as well. First, the Federal Sentencing Guidelines are constitutional. E.g., Mistretta v. United States, 488 U.S. 361 (1989); United States v. Brittman, 872 F.2d 827 (8th Cir.), cert. denied, 110 S. Ct. 184 (1989). Second, the district court's factual findings regarding the quantity of cocaine, role in the offense, obstruction of justice, acceptance of responsibility,

and criminal history are not clearly erroneous.

Because the district court did not violate law when imposing the appellants' sentences within the applicable guidelines range, or misapply the guidelines, we must affirm the sentences. United States v. Evidente, 894 F.2d 1000, 1003-04 (8th Cir.), cert. denied, 110 S. Ct. 1956 (1990). Finally, the district court did not abuse its discretion in denying departure below the guidelines range for circumstances the sentencing commission considered when formulating the guidelines, and we cannot review the district court's refusal to depart for circumstances the commission failed to consider. 18 U.S.C. §§ 3553(b), 3742(e) (1988); Evidente, 894 F.2d at 1004 & n.5.

Accordingly, we affirm. See 8th Cir. R. 47B.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 90-1610NI

United States of America,	* Order Denying
	* Petition for
Appellee,	* Rehearing with
	* Suggestion for
v.	* for Rehearing
	* En Banc
Thomas Dean Vogt,	*
	*
Appellant.	*

Appellant's suggestion for rehearing en banc has been considered by the court and is denied by reason of the lack of a majority of the active judges voting to rehear the case en banc.

June 25, 1991

Order Entered at the Direction of the Court:

/s/ Michael E. Gens

Clerk, U.S. Court of Appeals, Eighth Circuit

SUPREME COURT OF THE UNITED STATES

No. A-209

Thomas Dean Vogt,

Petitioner

v.

United States

O R D E R

UPON CONSIDERATION of the application of counsel for the petitioner,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled case, be and the same is hereby, extended to and including November 22nd, 1991.

/s/ Harry A. Blackmun
Associate Justice of the
Supreme Court of the
United States

Dated this 18th
day of September, 1991.

88 - 3777

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

UNITED STATES OF AMERICA,

Appellee

v.

DUDLEY P. HARDY,

Appellant

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

BRIEF FOR THE UNITED STATES

JOSEPH MAGRI
United States Attorney
Middle District of Florida

MERVYN HAMBURG
Attorney
Department of Justice
Washington, D.C. 20530

ARGUMENT

I

THE EVIDENCE WAS SUFFICIENT TO SUPPORT THE CONSPIRACY CONVICTION

Count I of the indictment charged that from about late 1982 to approximately January 1987 appellant conspired to distribute cocaine and to possess cocaine with intent to distribute. Appellant claims that the government failed to prove a conspiracy; in the alternative, appellant contends that the government proved multiple conspiracies that fatally varied with, or constructively amended, the charge in the indictment (App. Br. 27-32). We disagree.

In reviewing the sufficiency of the evidence, this Court must determine whether, viewing the evidence, together with all reasonable inferences and credibility choices, in the light most favorable to the government, a reasonable

trier of fact could find that the evidence established guilt beyond a reasonable doubt. Glasser v. United States, 315 U.S. 60, 80 (1942); United States v. Cole, 755 F.2d 748, 755 (11th Cir. 1985). So viewed, the evidence here was ample.

The ongoing cocaine parties sponsored by appellant, his friends and acquaintances, reflected a joint effort to obtain cocaine, distribute the drug among select invitees, and then consume it. The evidence showed that appellant provided a secure place where cocaine could be delivered, that oftentimes the suppliers were also guests of appellant, that cocaine was knowingly distributed and shared on the premises by appellant and his invitees, and that the incidents constituted "regularized activity" recurring over a substantial period of time. United States v. Russell, 703 F.2d

1243, 1247 (11th Cir. 1983). That proof satisfied each of the three elements of a drug conspiracy: the existence of a conspiracy, appellant's knowledge thereof, and his voluntary participation therein. United States v. Alberta, 727 F.2d 1055, 1060 (11th Cir. 1984).

Appellant does not deny that he knowingly shared cocaine on a regular basis with the numerous government witness who testified to that activity. His attack is confined to the question whether the government proved a conspiracy. Appellant raises several points. First he contends that no conspiracy was proved, either because the government established little more than the equivalent of a buyer-seller relationship or because Congress did not intend to punish the exchange of small amounts of drugs for personal use (App. Br. 27-30). Then he

alleges that assuming arguendo that a cocaine party constitutes a cognizable drug distribution conspiracy, the government proved multiple conspiracies rather than the single conspiracy charged in the indictment (App. Br. 30-32).

We do not dispute the premise that a mere buyer and a mere seller do not engage in a criminal drug conspiracy by engaging in a single transaction. However, that principle does not altogether prevent buyers and sellers from being conspirators. Clearly, they may form part of what is characterized as a chain conspiracy. Cf. United States v. Brito, 721 F.2d 743, 747 (11th Cir. 1983). Buyers and sellers become conspirators when they assume roles instrumental to the success of the conspiracy. United States v. Bascaro, 742 F.2d 1335, 1359 (11th Cir. 1984). Here, as in the case primarily

relied upon by appellant, United States v. Burroughs, 830 F.2d 1574, 1581 (11th Cir. 1987), appellant and those who furnished the cocaine for distribution to him and his party guests had a joint objective: distribution of cocaine for consumption on a regular basis in a safe locale. That scenario cannot fairly be equated with instances of isolated sales involving buyers and sellers with nothing more in common. Compare United States v. Ramirez, 608 F.2d 1261, 1264 (9th Cir. 1979).

Nor can appellant escape culpability by contending that Congress did not intend to punish the exchange of small amounts of drugs for personal use as crimes of possession or conspiracy (App. Br. 28). The Drug Abuse Act contains no jurisdictional minimums. Although the possession offense contained in 21 U.S.C. 841(a)(1) must at times be considered in

light of a statute making simple possession for personal use a lesser included offense (21 U.S.C. 844), there is no corresponding lesser included offense statute covering distributions. See United States v. Brown, 761 F.2d 1272, 1278 (9th Cir. 1985). Distribution of any amount of a controlled substance violates 21 U.S.C. 841(a)(1), see United States v. Sims, 529 F.2d 10,11 (8th Cir. 1976). It follows, therefore, that a conspiracy to distribute any amount of a controlled substance violates 21 U.S.C. 846.

(2)

No. 91-845

Supreme Court, U.S.
FILED
FEB 5 1992
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1991

THOMAS DEAN VOGT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General

ROBERT S. MUELLER, III
Assistant Attorney General

MERVYN HAMBURG
Attorney

Department of Justice
Washington, D.C. 20503
(202) 514-2217

QUESTIONS PRESENTED

1. Whether the evidence was sufficient to convict petitioner of conspiracy to distribute cocaine.

2. Whether petitioner was entitled to a downward departure from his Sentencing Guidelines sentencing range because the evidence did not show that he derived any financial gain from his drug distribution activities.

3. Whether the sentencing judge properly computed the amount of cocaine attributable to petitioner for purposes of sentencing under the Sentencing Guidelines.

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In the Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-845

THOMAS DEAN VOGT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals, Pet. App. 1a-6a, is unpublished, but the judgment is noted at 938 F.2d 184 (Table).

JURISDICTION

The judgment of the court of appeals was entered on May 15, 1991. A petition for rehearing was denied on June 25, 1991. On September 18, 1991, Justice Blackmun granted an extension of time within which to file a petition for a writ of certiorari until

November 22, 1991, and the petition was filed that day. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner and four co-defendants were indicted in the United States District Court for the Northern District of Iowa on 25 counts of violating the federal narcotics laws and obstructing justice. Petitioner was convicted of distributing cocaine to a person under the age of 21, in violation of 21 U.S.C. 841(a)(1) and 845(a) (to be recodified as 21 U.S.C. 859(a)); possessing cocaine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1); making his house available for distributing and using cocaine, in violation of 21 U.S.C. 856; and conspiring (a) to possess cocaine with intent to distribute it, (b) to distribute cocaine, (c) to distribute cocaine to a minor, and (d) to make a building available for storing, distributing, and using cocaine, in violation of 21 U.S.C. 846.[1] Petitioner was sentenced to 110 months in prison, to be followed by five years of supervised release, and was fined $12,500. Pet. Sent. Tr. 138-139.[2] The jury returned a special verdict identifying certain properties to be forfeited under

[1] Prior to trial, two of petitioner's co-defendants, Ronald Kelley and Rodney Jiruska, each pleaded guilty to conspiracy to violate the federal drug laws. Gov't C.A. Br. 1. Following a jury trial, petitioner's other co-defendants, Harry Ambrose and Larry Regennitter, were convicted on a variety of charges, including conspiracy to violate the federal drug laws. *Ibid.*; Pet. App. 3a.

[2] "Pet. Sent. Tr." refers to the sentencing hearing pertaining only to petitioner. "Sent. Tr." refers to the transcript of the joint sentencing hearing concerning petitioner, Ambrose, and Regenniter.

21 U.S.C. 853(a). The court of appeals affirmed. Pet. App. 1a-6a.

1. The evidence at trial established that petitioner and his co-defendants engaged in a conspiracy to purchase large amounts of cocaine from common sources and to distribute it at locations in and around Cedar Rapids, Iowa. Petitioner and his co-defendants acquired the cocaine primarily from a common group of suppliers consisting of Tim Johnson, Keith McVay, and Lonnie Vogt, petitioner's younger brother. Gov't C.A. Br. 11, 14.[3] The suppliers knew that petitioner and his co-defendants, including Harry Ambrose and Larry Regennitter, would redistribute the cocaine to various common friends, usually in social settings. *Id.* at 11-12. In turn, petitioner and his co-defendants were aware that Johnson, McVay, and Lonnie Vogt sold and supplied cocaine in and around Cedar Rapids and Iowa City. On several occasions, petitioner, Ambrose, and Regennitter each bought up to an ounce of cocaine from their common suppliers, after which they personally redistributed it among themselves and to others jointly known by them (including the suppliers) in various social settings. The distributions occurred at safe locations, such as the homes, businesses, and limousines of petitioner and his co-defendants. *Id.* at 13-15. The purpose underlying those distributions of cocaine was to advance petitioner and his co-defendants socially and sexually. *Id.* at 11.

---

[3] Johnson purchased cocaine from sources in Florida. When Johnson made his initial purchase from his Florida suppliers, petitioner furnished him with $3000 to enable Johnson to make a large purchase at a good price. Johnson repaid petitioner over time, principally by providing him with cocaine. Tr. 1289.

The evidence at trial showed that petitioner personally purchased cocaine from Johnson approximately 30 times between 1985 and 1987, in quantities ranging from a gram to an ounce. Tr. 1270. Petitioner invited Johnson to parties at his home on approximately five occasions; cocaine was present for general consumption at those parties, and Johnson saw petitioner laying out cocaine for the guests to use. Tr. 1284-1285. Petitioner also bought cocaine on several occasions from McVay, in quantities ranging up to an ounce. See Tr. 186-198. McVay attended parties at petitioner's residence approximately 15 to 20 times; he testified that cocaine was placed on a mirror in petitioner's bedroom for consumption by petitioner and others. Tr. 188-190.

Young women frequently attended the parties hosted by petitioner and his co-defendants. Gov't C.A. Br. 11, 15-16. On approximately 20 occasions in 1987 and 1988, petitioner engaged in sexual activity at his home with a prostitute who was 19 years old in 1987. Petitioner furnished her with cocaine each of the times he saw her. Tr. 760-768.

2. Following petitioner's conviction, the probation officer prepared an extensive Presentence Report (PSR) attributing 5,180.01 grams of cocaine to petitioner. PSR ¶ 274. Applying the Drug Quantity Table appended to Sentencing Guidelines § 2D1.1, the probation officer calculated a base offense level of 32. PSR ¶ 275. He added two levels for obstruction of justice, *id.* ¶ 279, which resulted in an adjusted offense level of 34. *Id.* ¶ 281.

Petitioner disputed the computations. The district court held a four-day sentencing hearing, during which the court considered petitioner's objections to the Presentence Report. In its final quantity deter-

minations, the court reviewed the Presentence Report's assessments paragraph by paragraph and made specific findings regarding the amount of cocaine chargeable to petitioner. Many of the quantities charged to petitioner in the Presentence Report were stricken, and the district court ultimately attributed only 861.45 grams of cocaine to petitioner. The court accordingly lowered petitioner's base offense level to 26 for drug quantity.

Among his claims, petitioner challenged the probation officer's inclusion of certain quantities of cocaine that were distributed by his unindicted coconspirator McVay. Pet. Objections to PSR ¶¶ 28, 30. Those amounts were assessed against petitioner as reasonably foreseeable distributions in furtherance of the conspiracy. Sent. Tr. 394-395; see Guidelines § 2D1.4, Application Note 1 (Oct. 1987). The evidence regarding McVay focused on two transactions. First, petitioner purchased a half-ounce that McVay removed from a package containing two ounces. PSR ¶ 62. In the second, McVay sold an ounce of cocaine to petitioner and told petitioner that the ounce was part of a half-pound purchase McVay had just made. *Id.* ¶ 64. The district court found that petitioner should be charged with the gross amounts that McVay possessed, and not merely the amounts McVay sold to petitioner. See Sent. Tr. 394-395.

The final computation by the court also included 250 grams relating to petitioner's purchases from Johnson. The probation officer had calculated the amount at 425.25 grams, based upon Johnson's trial testimony that he made at least 30 sales of cocaine to petitioner in quantities ranging from a gram to an ounce. PSR ¶50. The probation officer calculated that figure by multiplying 30 sales by an estimated "middle range" of one-half ounce of cocaine per sale.

Ibid. Petitioner disputed the computation, claiming that he should be assessed only 21 grams for his purchases from Johnson. Tr. 387-388. Following the sentencing hearing, the court rejected petitioner's calculation, but reduced the chargeable amount to 250 grams. Pet. 15.

3. Petitioner asked the court to depart downward from the Guidelines range, arguing that the Guidelines did not take into account distributions that were not intended for profit. The district court rejected that contention, noting that a desire for financial gain is not an element of the narcotics offenses with which petitioner was charged. Pet. Sent. Tr. 89. The court added that in its view the Sentencing Commission had implicitly considered and rejected the absence of a profit motive as a factor bearing on the appropriate sentence to be imposed in drug cases. *Ibid.*

4. The court of appeals affirmed petitioner's convictions and sentence in an unpublished opinion. Pet. App. 1a-6a. The court first held that the evidence was sufficient to support his conviction for conspiracy. *Id.* at 3a. It then rejected challenges to the district court's factual findings concerning the quantity of cocaine chargeable to petitioner, *id.* at 4a-5a, and it affirmed the district court's decision not to depart downward from the Guidelines sentencing range for petitioner's offense, *id.* at 5a. The court further held that it could not review the district court's refusal to depart downward "for circumstances the commission failed to consider" when formulating the Guidelines. *Ibid.*

ARGUMENT

1. Petitioner contends that he was not a member of a conspiracy to distribute cocaine because his drug associations occurred in a social, rather than commercial, context. Pet. 19-25. Congress, however, broadly defined "distribute" to mean, "to deliver (other than by administering or dispensing) a controlled substance or a listed chemical." 21 U.S.C. 802(11). By defining the word "distribute" in terms of delivery, and not sale, Congress prohibited individuals from supplying such drugs to others for social use. See, *e.g.*, *United States* v. *Corral-Corral*, 899 F.2d 927, 936 n.7 (10th Cir. 1990); *United States* v. *Ramirez*, 608 F.2d 1261, 1264 (9th Cir. 1979) (a non-commercial sharing constitutes a distribution); see also *United States* v. *Coady*, 809 F.2d 119, 124 (1st Cir. 1987). Accordingly, a conspiracy to distribute drugs—even for social purposes—violates the federal narcotics laws just as much as a conspiracy to distribute drugs for profit.

Petitioner errs in asserting that the decision below conflicts with *United States* v. *Hardy*, 895 F.2d 1331 (11th Cir. 1990). The court of appeals in *Hardy* held that the evidence was insufficient to convict the defendant of a conspiracy to distribute cocaine. The evidence in that case showed that the defendant regularly hosted parties attended by drug users and suppliers, and often used cocaine himself. But the only evidence supporting the charge that Hardy conspired to distribute cocaine was that he once purchased one-eighth of an ounce of cocaine to use with a friend and on another occasion gave a small amount of cocaine to a house guest. *Id.* at 1334. The court found Hardy's two isolated instances of sharing or

transferring small amounts of cocaine insufficient to sustain an inference that he had agreed to engage in distribution. *Id.* at 1334-1335.

In this case, by contrast, the evidence established that petitioner financed Tim Johnson's initial purchase of cocaine in Florida and subsequently purchased up to an ounce of cocaine from Johnson approximately 30 times. Tr. 1270, 1289. Petitioner repeatedly purchased cocaine from Keith McVay as well. Tr. 186-198. On several occasions, petitioner and his co-defendants purchased cocaine from common suppliers, and shared and redistributed it among themselves and other persons jointly known to them (including their common suppliers). Gov't C.A. Br. 15. The government's proof therefore established a course of joint conduct beginning with petitioner's provision of "seed money" for the first cocaine purchase and ripening into an agreement under which petitioner and his co-defendants acquired cocaine from common suppliers and redistributed it among themselves and to others for their mutual benefit. *Id.* at 14-16. The court of appeals properly held that there was sufficient evidence to sustain petitioner's conspiracy conviction. Pet. App. 3a.

2. Petitioner argues that the district court erred in denying him a downward departure from the Sentencing Guidelines sentencing range based on the fact that he did not engage in a narcotics distribution conspiracy for profit.[4] Pet. 26-37. A district court may

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[4] We agree with petitioner's statement, Pet. 35-37, that a court of appeals may not review a discretionary decision not to depart, but may review a claim that a district court erred in holding that it was without authority to depart. See, *e.g.*, *United States* v. *Bierley*, 922 F.2d 1061, 1066 (3d Cir. 1990). To the extent that the opinion of the court of appeals misstates the standard of review, see Pet. App. 5a, that mis-

depart from the range of punishment set by the Guidelines if it finds a "mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described." 18 U.S.C. 3553(b). Several Guidelines relating to offenses other than petitioner's offenses of conviction explicitly provide for decreased offense levels when a defendant has not acted for profit. Guidelines § 2G1.1, Application Note 1 (transportation for the purpose of prostitution or prohibited sexual conduct), § 2L1.1(b)(1) (smuggling, transporting, or harboring an unlawful alien), § 2L2.1(b) (trafficking in evidence of citizenship or documents authorizing entry), § 2L2.3(b) (trafficking in a United States passport). Those provisions indicate that the Commission explicitly considered when the lack of a profit motive should result in a lower sentence for an offense described in the Guidelines; in light of those provisions, the Commission's failure to provide for such an adjustment in the case of narcotics offenses appears clearly to have been the product of a considered decision.

We recognize that the Guidelines provide that a court "may depart from the guidelines, even though the reason for departure is listed elsewhere in the guidelines." Guidelines § 5K2.0 (Nov. 1, 1989). But the Commission expressly limited such authority to circumstances in which the district court "determines that, *in light of unusual circumstances*, the guideline level attached to that factor is inadequate." *Ibid.*

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statement does not merit this Court's review; the decision of the district court was correct, and the opinion of the court of appeals is unpublished and therefore without precedential value, 8th Cir. R. 47B, App. I.

(emphasis added). Petitioner has suggested no "unusual circumstances" accompanying his lack of profit motive that would support a departure from the Commission's implicit determination that the absence of a profit motive should carry no weight in setting the penalty for narcotics offenses.[5]

3. Petitioner next contends that the district court made insufficient findings concerning (a) the 283.5 grams of cocaine attributed to him based on two purchases from McVay, and (b) the 250 grams of cocaine attributed to him based on his 30 purchases from Johnson. Pet. 38-47.

a. With respect to the disputed amounts attributable to petitioner's purchases from McVay, the district court charged petitioner with 56.7 grams (two ounces) and 226.8 grams (one-half pound). The court did so based on McVay's testimony that petitioner had, on two occasions, purchased smaller quan-

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[5] That determination is entirely reasonable, as this case demonstrates. Petitioner "was a purveyor and distributor of a siz[e]able quantity of cocaine to the score and more of persons who appeared * * * and testified against him. He has been found by the jury to have been part of a conspiracy that lasted for years, and the testimony clearly shows he committed uncounted overt acts in furtherance of that conspiracy." Pet. Sent. Tr. 127. Petitioner also created a market for the narcotics sold by his co-conspirators—Johnson, McVay, and Lonnie Vogt—who profited financially from the conspiracy of which petitioner was a part. Petitioner also provided the financing necessary for Johnson to initiate his Florida cocaine purchases. Tr. 1289. In addition, by distributing cocaine free of charge and providing safe places to use it, petitioner encouraged the consumption of cocaine by those who might not otherwise have acquired or used the drug. As the district court noted, petitioner "was not a mere recreational user who committed a * * * 'technical' * * * violation of the drug distribution laws." Pet. Sent. Tr. 127.

tities of cocaine (a half-ounce and an ounce) with the knowledge that McVay was selling those drugs from larger quantities (two ounces and a half pound) in his possession. Petitioner does not dispute that he could be assessed with the larger quantities of cocaine if McVay's possession of those amounts was in furtherance of the conspiracy and reasonably foreseeable by petitioner, Pet. 38-39; he claims merely that the district court did not make adequate findings that McVay possessed the cocaine in furtherance of the conspiracy, Pet. 39-42.

The record makes it clear that the district court found that McVay possessed the larger amounts of cocaine in furtherance of a conspiracy with petitioner. During the sentencing hearing, the court specifically requested that the parties address the quantities of cocaine attributable to petitioner under Guidelines § 2D1.4, Application Note 1. Sent. Tr. 371. The court explained that Section 2D1.4 allowed the imposition of sentence based upon the defendant's conduct or the conduct of his co-conspirators that was in furtherance of the conspiracy and known or reasonably foreseeable to the defendant. Sent. Tr. 371. After hearing argument from the government, *id.* at 372-374, and petitioner, *id.* at 388, the court specifically adopted, "under the co-conspirator rule," *id.* at 395, the probation officer's findings attributing to petitioner two ounces (56.7 grams) and one half pound (226.8 grams) of cocaine.[6]

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[6] Petitioner makes the conclusory assertion that there was no evidence to support a finding that he had an agreement with McVay regarding the sale of drugs to other people. Pet. 41-42. The district court, however, was justified in inferring from the evidence of the intimate and mutually beneficial dealings among the co-conspirators, including petitioner and McVay, that petitioner and McVay were co-conspirators in

b. Petitioner also contests the attribution to him of 250 grams of cocaine in connection with 30 sales made to petitioner by Johnson. Pet. 42-47. Based on Johnson's testimony that petitioner purchased cocaine from him on at least 30 occasions, in quantities ranging from a gram to an ounce, Tr. 1270-1271, the probation officer estimated an average of one-half ounce per sale and assessed 425.25 grams against petitioner for 30 purchases. PSR ¶ 50. Petitioner objected to that assessment, claiming that a more accurate estimate of his purchases from Johnson was one-eighth of an ounce on 10-12 occasions—a total of 42 grams. Pet. Objections to PSR ¶ 21. Petitioner would have excluded half that amount for personal use, leaving 21 grams attributable to him from his purchase from Johnson. *Ibid.*[7] After considering petitioner's objection, the district court arrived at an estimate of 250 grams, or slightly in excess of one-quarter ounce per sale multiplied by 30 sales.

The district court did not clearly err in making that estimate. Where, as here, "there is no drug seizure or the amount seized does not reflect the scale of the offense," the Sentencing Guidelines provide that the district court "shall approximate the

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the distribution scheme and that McVay possessed the larger amounts in furtherance of the conspiracy. Petitioner misplaces reliance, Pet. 41, on *United States* v. *North*, 900 F.2d 131, 133-134 (8th Cir. 1990), and *United States* v. *Carmody*, 753 F. Supp. 917, 918-919 (M.D. Ala. 1990), aff'd, 940 F.2d 673 (11th Cir. 1991) (Table)—which merely establish that a defendant cannot be charged with quantities of narcotics based on a co-conspirator's sales if the conspiracy in which the defendant is involved does not contemplate such other distributions.

[7] Petitioner now contends that his testimony showed that he purchased no more than 99 grams from Johnson. Pet. 45.

quantity of the controlled substance." Section 2D1.4, Application Note 2. The court's estimate here reflected a thorough familiarity with extensive testimony at a lengthy trial, a credibility determination, and a conservative calculation of quantity that was well below even the "middle range," PSR ¶ 50, that the probation officer had estimated. The court of appeals therefore properly affirmed petitioner's sentence. See *United States* v. *Paulino*, 935 F.2d 739, 756 (6th Cir. 1991) (affirming findings based on conservative estimate of drug quantities).

In any case, petitioner acknowledges that the Eighth Circuit has adopted the proper framework in approximating drug quantities under Section 2D1.4. See Pet. 46 (citing with approval and relying on *United States* v. *Lawrence*, 915 F.2d 402, 408 (8th Cir. 1990)). He claims only that the court misapplied its own precedent in its unpublished opinion here. Even if such a claim otherwise merited this Court's review, but see *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam), it would not in this case. If the district court had assessed petitioner with 21 grams (as he requested), rather than 250 grams, the difference would have been insufficient to reduce petitioner's base offense level below level 26.[8] Guidelines § 2D1.1 (Drug Quantity Table). Thus, even if the district court erred, that

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[8] The district court made a final quantity determination of 861.45 grams of cocaine. If the court had assessed petitioner with 21, and not 250, grams of cocaine based on his purchases from Johnson, the final quantity charged to petitioner would have been 632.45 grams. Under the Drug Quantity Table applicable to petitioner's offense, that amount would give rise to a base offense level of 26, Guidelines § 2D1.1—the same level that the court assessed based on the larger quantity.

error was harmless. *United States* v. *Frondle*, 918 F.2d 62, 65 (8th Cir. 1990), cert. denied, 111 S. Ct. 1400 (1991).[9]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

ROBERT S. MUELLER, III
Assistant Attorney General

MERVYN HAMBURG
Attorney

FEBRUARY 1992

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[9] Contrary to petitioner's contention, the district court did not violate Fed. R. Crim. P. 32(c)(3)(D). That Rule provides in relevant part that if the defendant alleges a factual inaccuracy in the presentence report, the court shall make a "finding as to the allegation." Fed. R. Crim. P. 32(c)(3)(D)(i). In this case, petitioner alleged that the Presentence Report erroneously assessed 424.5 grams of cocaine in connection with his purchases from Tim Johnson; the district court made a finding that the proper assessment against petitioner was 250 grams.

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(3)

No. 91-845

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

THOMAS DEAN VOGT,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF

JAMES M. LAROSSA
LAROSSA, MITCHELL & ROSS
Attorneys for Petitioner
41 Madison Avenue
New York, New York 10010
(212) 696-9700

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THOMAS DEAN VOGT,

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- against -

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REPLY BRIEF

ARGUMENT

I

THE GOVERNMENT CONCEDES THAT THE COURT OF APPEALS APPLIED THE WRONG STANDARD OF REVIEW ON DEPARTURE

The government candidly concedes that the court of appeals erred in ruling that it could not review the district court's finding that it lacked the authority to grant petitioner a downward departure from the Sentencing Guidelines. Brief in Opp. at 8 n.4. Nevertheless, the government urges this Court to deny the petition on the grounds that "the district court was correct [in denying departure], and the opinion of the court of appeals is unpublished and therefore without precedential value." Id. (citation omitted). Neither of these reasons, however, warrant that this Court should disregard the conceded error of the court of appeals.

First, petitioner's main brief establishes that the district court did in fact have the authority to depart downward from the sentencing guidelines in this case. See Pet. at 27-35. While the government claims that cases involving not-for-profit conspiracies to distribute drugs were considered -- and found to be irrelevant -- by the Sentencing Commission in formulating the guidelines for narcotics offenses, Brief in Opp. at 9, it fails to cite a single case in which the government has successfully prosecuted such a conspiracy. Thus, the government's argument is completely at odds with the Guidelines themselves, which indicate that they were designed to incorporate only those factors which made a "significant difference in pre-guidelines sentencing practice." U.S.S.G. Ch.1, Pt. A, intro. comment. 4(b).

Secondly, the fact that the Eighth Circuit's opinion is unpublished does not in any way alter the fact that the court of appeals failed to follow its own precedent as well as that of the other circuits. See cases cited in Pet. at 36-37. Moreover, should this Court deny the instant petition for certiorari, petitioner will have been denied any appellate review of his claim, notwithstanding that the government concedes it is fully reviewable.

II

THE DISTRICT COURT DID NOT MAKE THE REQUIRED FINDINGS REGARDING THE QUANTITY OF DRUGS ATTRIBUTABLE TO PETITIONER FOR PURPOSES OF SENTENCING

A. The Johnson Purchases

The government asserts that "[i]n its final quantity determinations, the court reviewed the Presentence Report's assessments paragraph by paragraph and made specific findings regarding the amount of cocaine chargeable to petitioner." Brief in Opp. at 5 (emphasis added). The government's statement, however, is terribly misleading. The district court merely prepared a chart indicating the number of grams that should be attributed to each defendant in relation to the various paragraphs of the pre-sentence report. There was absolutely no record made, nor any explanation given,

as to the basis for any of the amounts on the court's chart.

Accordingly, when the government claims that the court's estimate of 250 grams in relation to the Johnson purchases represents "slightly in excess of one quarter ounce per sale multiplied by thirty sales," Brief in Opp. at 12, it is merely speculating as to how the court arrived at its assessment. Moreover, it seems very unlikely that the court would make an "estimate" using 8.333 grams (250 grams divided by thirty) as the base amount for each purchase.

It is not disputed that a sentencing court may approximate the amount of drugs attributable to a defendant in a case where no drugs are seized. See U.S.S.G. § 2D1.4, comment. (n.2). But, if an approximation is made, as it was here, there must be an evidentiary basis in the

record to support the amount chosen. See Pet. at 46. Because there was absolutely no evidence in the record to support the amount assessed here, however, coupled with the fact that the court failed to put on the record how it arrived at its figure, certiorari should be granted.

B. The McVay Quantities

The government urges this Court to infer that the district court found the McVay quantities to be "in furtherance of the conspiracy" from the court's reference to U.S.S.G. § 2D1.4 and the court's statement that it was assessing these amounts under the "co-conspirator rule." Brief in Opp. at 11. While the court did mention the "co-conspirator rule," however, it never applied the second prong of the rule in this case. In other words, although the court found that the McVay quantities were foreseeable to petitioner,

it never made any specific finding -- despite the government's assertion to the contrary -- that these quantities were in furtherance of the alleged conspiracy. See Pet. at 39.

III

THE GOVERNMENT HAS NOT PROVEN A CONSPIRACY TO DISTRIBUTE NARCOTICS

Despite the government's mischaracterization of his argument, petitioner has never asserted that there must be a "sale" of narcotics in order for there to be a "distribution."[1] See Brief in Opp. at 7. Rather, petitioner's claim is that the not-for-profit sharing of cocaine among drug users and suppliers in social settings is not, in and of itself, sufficient to establish an agreement to distribute drugs.

Furthermore, the government takes the astonishing position that the Eighth Circuit's opinion does not conflict with the Eleventh Circuit's decision in United

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[1]Accordingly, the cases cited by the government on this issue -- all of which merely support the proposition that there need not be a "sale" to establish a "distribution" -- are inapposite.

States v. Hardy, 895 F.2d 1331 (11th Cir. 1990). In a desperate attempt to distinguish Hardy, the government states that "the only evidence supporting the charge that Hardy conspired to distribute cocaine was that he once purchased one-eighth of an ounce of cocaine to use with a friend and on another occasion gave a small amount of cocaine to a house guest." Brief in Opp. at 7 (emphasis added). As evidenced by the government's own brief on appeal in Hardy, however, "the evidence showed that [Hardy] provided a secure place where cocaine could be delivered, that often times the suppliers were also guests of [Hardy], that cocaine was knowingly distributed and shared on the premises by [Hardy] and his invitees, and that the incidents constituted 'regularized activity' recurring over a

substantial period of time." Pet. App. at 11a.

Finally, the government attempts to inject a "commercial" element into this case by repeatedly claiming that petitioner financed Johnson's initial purchase of cocaine in Florida. See Brief in Opp. 3 n.3, 8. At the very least, this is a misleading half-truth. Although Johnson did testify that at one time petitioner loaned him $3,000 and that he bought cocaine with the money, (R. 1289), he never asserted -- and there was not a scintilla of evidence adduced at trial -- that petitioner knew the purpose for the loan.[2] The government's assertion,

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[2]In fact, the only witness to testify as to whether petitioner knew the purpose of the loan was petitioner himself, who testified that the money was a personal loan and was not for the purpose of enabling Johnson to purchase drugs. (R. 3746).

therefore, lacks any support in the record.

CONCLUSION

For the reasons set forth above and in the petition, the petition for a writ of certiorari should be granted.

Dated: New York, New York
February 13, 1992

Respectfully submitted,

JAMES M. LaROSSA
LaROSSA, MITCHELL & ROSS
Attorneys for Petitioner
Thomas Dean Vogt
41 Madison Avenue
New York, New York 10010
(212) 696-9700

Of Counsel

Karen F. Silverman
Andrew J. Weinstein